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Memo

To: Ari Appel
From: Rich Eisenberg
Re: Federal Tax Law Implications of Post-Election Advocacy by a 501(c)(3) Organization
Date: September 30, 2020

As a result of the stresses on U.S. election systems arising from the COVID-19 pandemic, as well as public indications, expressed in news reports, that a candidate for the Presidency may be unwilling to accept the lawful outcome of the election, there is growing concern that the process of counting the ballots and determining the winner of the 2020 Presidential Election may be extraordinarily drawn-out, contested, and/or clouded by controversy and uncertainty. In light of this concern, you have asked for guidance about how the Combined Defense Project (CDP) and allied 501(c)(3) organizations ("501(c)(3)s") may lawfully advocate in support of the fair counting of ballots and otherwise participate in efforts to protect the integrity of the election as one that reflects the people's choice.

This memorandum is intended to outline the main legal principles applicable to 501(c)(3)s' participation in such activities, to identify the legal risks involved, and to offer some recommendations for 501(c)(3)s to mitigate the attendant risks. However, just as the types of post-Election Day controversies discussed here would be unprecedented in modern United States history, the legal questions that would arise regarding the permissibility of 501(c)(3)s' activities relating to such controversies would also be without legal precedent. While this memorandum aims to draw educated conclusions in light of existing legal guidance, readers should be mindful that the IRS, having not considered the precise issues discussed here before, may reach different conclusions.

No two 501(c)(3)s are identical, and each organization must consider its own risk profile and vulnerabilities in deciding whether and how to engage in this area, as well as any limitations on activities set forth in its governing documents or funder-imposed restrictions on activities.

I. Summary

501(c)(3)s may lawfully engage in *non-partisan* communications and activities carried out for the purpose of protecting the right of all lawful voters to vote and have their votes counted, whether before or after Election Day. Of course, any public controversy surrounding a contested election can be expected to attract a high level of partisan activity and fervor. 501(c)(3)s should remain mindful of the prohibition against participation or intervention in a political campaign, which is detailed below. While the IRS will evaluate the question of whether a 501(c)(3) organization violated the prohibition on electioneering by looking at "all of the facts and circumstances," here are some strategies for 501(c)(3)s to reduce the likelihood their activities would be viewed as violating the prohibition on political campaign activity:

- Focus on the process, not the outcome. 501(c)(3)s can make communications and engage in activities to ensure an accurate count of the vote, or more broadly to uphold the integrity of the election process, if they do so without regard to which candidate stands to benefit. On the other hand, if a 501(c)(3)'s activities are (or appear to be) aimed at supporting one candidate's claim to a contested election over the other's the IRS may well view those activities as impermissible political campaign activity.

- Use consistent messaging, rather than seeming to react on a partisan basis to developments. 501(c)(3)s should use consistent and objective messaging (e.g. "All ballots cast before Election Day should be counted" or "No changes to the rules should be made after Election Day") rather than seeming to pick and choose issue positions based on which candidate would stand to benefit. 501(c)(3)s should also strive to avoid use of language that is identical or seems to mimic that being used by one of the candidates.

- Use discipline when naming one of the candidates in a communication. The fact that a 501(c)(3) organization uses the name of one of the candidates in a public communication, or indicates a viewpoint on that candidate, should be less likely to indicate the organization is participating or intervening in a political campaign in the post-election context than it would in the period of time shortly before an election, for the simple fact that after the election the voters have cast their ballots. On the other hand, the IRS may view communications directed to individuals with a continuing role in directly determining the outcome of the election (e.g. electors, state officials, and potentially ultimately the United States Congress) similarly to communications to voters communications to voters shortly before Election Day. In addition, statements that evidence a bias regarding the outcome of the election would be available evidence that the IRS would likely consider in determining whether the 501(c)(3)'s activity was aimed at influencing the outcome of the contested election.

- Avoid coordinating activities with political organizations. 501(c)(3)s should avoid coordinating their activities with or otherwise supporting the work of any candidate's campaign committee, political party committee, PAC, or other political organization. A 501(c)(3) organization may work with a 501(c)(4) organization conducting non-partisan advocacy that furthers the 501(c)(3)'s exempt purposes and may distribute materials created by such organizations so long as those materials do not contain 501(c)(3)-prohibited partisan messages. However, 501(c)(3)s must avoid coordinating with or otherwise subsidizing the partisan activities of their 501(c)(4) affiliates or allies.

In addition, 501(c)(3)s must adhere to the applicable limitations on their lobbying activities. Efforts by a 501(c)(3) organization to influence legislation in the course of their post-

election advocacy (e.g., asking state legislators to introduce or pass a bill to extend the deadline for counting ballots, or calling on the public to contact their legislators to support such a bill or asking a governor to sign or veto such a bill) would be subject to the limitation on the organization's lobbying. On the other hand, advocacy by a 501(c)(3) organization that is directed to executive or administrative officials unrelated to legislation (e.g. calling on a state's Governor or Secretary of State to continue the counting of ballots) or judicial officials (e.g. protesting outside of a courthouse against a potential order halting the counting of ballots) would not be lobbying for federal tax purposes.

II. Legal Analysis

501(c)(3)s must be organized and operated exclusively for charitable, educational, or similar purposes enumerated in that section of the Internal Revenue Code. IRS regulations define the term "charitable" in this context to include activities "to defend human and civil rights secured by law." 26. C.F.R. 1.501(c)(3)-1(d)(2). The right to vote and have one's vote counted is one such right. Accordingly, activities carried out for the purpose of protecting individuals' right to vote and have one's vote counted are clearly within the scope of 501(c)(3)-permissible activities. This is true in the pre-Election Day context and is no less true in the context of a post-Election Day dispute over the counting of ballots or the integrity of the ballot count.[1]

Nevertheless, activities relating to a contested election raise certain risks and legal questions for 501(c)(3)s, specifically: (i) whether the activity would violate the statutory prohibition on a 501(c)(3)'s direct or indirect participation in, or intervention in, any political campaign on behalf of or in opposition to any candidate for elective public office; and (ii) whether the activity would be considered an effort to influence legislation and thus subject to the limitations applicable to lobbying by 501(c)(3)s. This section of the memorandum provides an overview the law in these areas as applied to the context of a contested election.

Note that a 501(c)(3)'s governing documents (such as articles of incorporation, charter, or bylaws) may authorize a narrower range of activities than is permissible for a 501(c)(3) organization under the Internal Revenue Code. Accordingly, organizations should consider the legal principles generally applicable to 501(c)(3)s as well as their own governing documents in determining how they may permissibly engage in the activities discussed below.

A. Prohibition on Political Campaign Activity

[1] As used in this memorandum, "Election Day" is intended to refer to the final day on which voters can cast ballots for a particular elective office. In jurisdictions that hold runoff elections, this may be a date later than the first Tuesday after the first Monday in November (the federal general election date). Organizations operating in or around jurisdictions that hold runoff elections should be mindful that they continue to operate in close proximity to an upcoming election until the runoff election has occurred.

501(c)(3)s are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of or in opposition to any candidate for elective public office. The set of activities that will be considered impermissibly "political" for a 501(c)(3) organization is much broader than those activities regulated under federal or state election laws. To determine whether or not any 501(c)(3)'s activity violates this prohibition, the IRS examines all the relevant "facts and circumstances," including not only the 501(c)(3)'s activity itself, but also the context in which it took place. While there is a great deal of ambiguity inherent in the "facts and circumstances" test, the IRS has provided guidance about how it will apply this test in certain discrete scenarios.

1. Nonpartisan Election-Related Activities

The IRS has made clear that 501(c)(3)s are permitted to conduct certain activities that directly relate to elections, such as voter-registration and get-out-the-vote (GOTV) drives, if they are "conducted in a non-partisan manner" rather than "in a biased manner that favors (or opposes) one or more candidates." Rev Rul. 2007-41 at 3. These activities will be considered to have a partisan bias if they are conducted in a partisan manner (e.g. turning away individuals whom you expect support a particular candidate or party), or if they are targeted in a way calculated to have a partisan impact (e.g. targeting voters based on what party they are registered under or similar partisan criteria). On the other hand, it is often permissible for a 501(c)(3) organization to use nonpartisan criteria to target their civic engagement activities, such as targeting its existing list of members and supporters without reference to political party, targeting classes of voters that traditionally are underrepresented and/or traditionally less likely to vote, so long as there is no messaging suggesting a bias for one or more candidates.[2]

The IRS's approach to voter registration and GOTV activities would seem to translate naturally to certain types of activities in relation to a contested election. For example, a 501(c)(3) organization might, on a nonpartisan basis, provide information to voters about how to verify whether their absentee or mail-in ballot was counted, or might provide updates to voters about what is happening in the process for counting their votes. However, 501(c)(3)s should never offer or refuse assistance or information to a voter on the basis of which candidate the voter cast their ballot for (or is perceived as likely to have voted for). If the 501(c)(3) organization takes precautions similar to those that it would take in the context of a pre-election

[2] Additional risk factors that the IRS has identified include that the 501(c)(3) organization's communications about the activity refer to a candidate or political party or otherwise suggest or imply approval or disapproval of any candidate or party. In addition, note that an otherwise 501(c)(3)-permissible activity may be tainted by bad facts. For example, the IRS might deem an otherwise nonpartisan voter registration drive to be electioneering if there were evidence (such as a planning memo for the effort) that the drive was targeted to a particular community in order to increase the turnout of a particular constituency expected to support a particular candidate, or if the 501(c)(3)'s ostensibly nonpartisan activities are conducted in the same area as an affiliated 501(c)(4)'s partisan activities.

civic engagement effort, it is unlikely the IRS would view such activities as impermissible political campaign activity.

2. Issue Advocacy vs. Political Campaign Activity

501(c)(3)s are permitted to advocate on issues of political importance, including issues that divide candidates in an election, in the course of carrying out their charitable and/or educational purposes. However, particularly (but not only) in the period of time shortly before an election, 501(c)(3)s must ensure that their issue advocacy does not suggest support for or opposition to any candidate. For organizations advocating on politically salient issues, the line between permissible issue advocacy and prohibited political campaign intervention can become murky.

As noted above, to determine whether or not any 501(c)(3)'s activity violates this prohibition, the IRS examines all the relevant "facts and circumstances." The IRS has set forth certain non-exclusive factors that, if present, tend to indicate a particular activity is 501(c)(3)-permissible ("good facts") and other factors that, if present, tend to indicate that an activity constitutes prohibited campaign intervention ("bad facts"). The table below reflects the criteria that the IRS has set out:

"Good Facts" *A 501(c)(3)'s public communication or activity is more likely to be seen by the IRS as permissible if the communication or activity:*	**"Bad Facts"** *A 501(c)(3)'s public communication or activity is more likely to be seen by the IRS as impermissible political campaign intervention if the communication or activity:*
• Does not refer to a candidate, the election, or voting • Describes the candidates' positions on a broad range of issues • Is motivated by non-campaign events beyond the control of the organization (e.g., an imminent legislative vote) • Is similar to previous non-electoral communications or activities by the 501(c)(3)	• Is deliberately timed to coincide with the election • Focuses on a "wedge issue" that divides the candidates • Is targeted to an audience selected for its relevance to the election (e.g., likely Democratic supporters) • Compares the 501(c)(3)'s preferred policy position to the position of a candidate or multiple candidates (including rating or scoring the candidates' positions) • Is done at the request or suggestion of a political candidate, campaign, or party

Again, the IRS will consider all facts and circumstances, presumably including the unique circumstances presented by a contested election. In this regard, it is important to acknowledge that the factors above are tailored to determining, based on objective criteria, whether the 501(c)(3)'s communications would suggest or imply to voters receiving the message that they should vote for or against a particular candidate in an election. Indeed, the IRS has emphasized that "[a] communication is particularly at risk of political campaign intervention when it makes reference to candidates or voting ***in a specific upcoming election***." (Rev. Rul. 2007-41 at 8–9 (emphasis added).) With this in mind, and in light of these factors, 501(c)(3)s are wise to

exercise great care when referring to candidates or to voting in the period of time shortly *before* an election.

But the effort to apply these factors in the context of a contested election raises new questions. Ordinarily, when the result of an election is effectively determined on the night of the election or shortly thereafter, statements that would have been very risky for a 501(c)(3) to make in the week *prior* to Election Day (e.g. "President Trump continues his assault on America's democratic values." or "Help us mobilize to prevent Trump from succeeding in his agenda!") become much safer in the weeks *after* Election Day, since advocacy criticizing a just-elected incumbent president who no longer faces an election does not constitute influence any candidate's electoral prospects. The contested election presents something of a hybrid case, where the electoral contest is in one sense ongoing (in that its outcome is undetermined) but the public's role as voters has ceased.

While the question is far from settled (indeed, it has never been addressed in IRS guidance), organizations likely have more flexibility to refer positively or negatively to a candidate in the course of many of its post-Election Day communications. With no further votes to be cast, the IRS would be expected to place considerably less weight on factors such as whether a 501(c)(3)'s post-election communications reflect positively or negatively about a particular candidate or implies a preference for one candidate over another in determining whether the organization was engaged in political campaign activity. For example, public communications calling out behavior or comments by one candidate as jeopardizing the integrity of the vote count are likely within the range of permissible 501(c)(3) activity in the post-Election Day context. But while the expression of an electoral preference may be *less* risky for a 501(c)(3) as it would be before Election Day, it would be still be available as evidence before the IRS as it evaluates all of the facts and circumstances relating to the organization's activities after Election Day. And communications that are aimed at individuals who (unlike the public at large) still have a role in choosing the winner of the election—such as persons charged under state law with determining which candidate's electors are chosen, or the electors themselves—might be analyzed by the IRS similarly to a communication to the voters in the period of time shortly before Election Day.

Another factor the IRS looks at is whether the communication is similar to previous non-electoral communications by the organization. Most 501(c)(3)s—and certainly most environmental advocacy organizations—are not in the practice of advocating around issues like the continued counting of mail ballots and the integrity of a disputed election. By stepping in and beginning to advocate on these issues at a time when there is an active dispute between two candidates, there is inherent risk that the 501(c)(3) organization would be seen as intervening in that dispute. To mitigate that risk, 501(c)(3)s should be careful to set forth consistent and objective messaging (e.g. "All ballots cast before Election Day should be counted" or "No changes to the rules should be made after Election Day") rather than seeming to pick and choose

issue positions based on which candidate would benefit. 501(c)(3)s should also strive to avoid use of language that is identical or seems to mimic that being used by one of the candidates.

Whatever specific factors the IRS chose to focus on in examining a 501(c)(3)'s communications and activities in the context of a contested election, the IRS would likely try to determine whether, under the facts and circumstances (including the organization's actions and statements), the organization intervened in support of one of the candidate's efforts to prevail in the dispute. Accordingly, the most compelling fact that a 501(c)(3) organization could show the IRS would be that its activities were focused on objective principles (e.g., "every vote should count") and not on a specific outcome (e.g., a Biden victory). By contrast, any indication that the organization is seeking to promote a specific outcome would likely weigh strongly against the organization.

3. Working with Non-501(c)(3) Organizations

An event as highly salient as a contested presidential election can be expected to trigger activism and involvement by a wide range of actors with different goals. While some of those goals (e.g. the fair counting of ballots, ensuring the lawful result is upheld) are 501(c)(3)-permissible, other goals (e.g. the certification of electors who will vote for Joe Biden) are clearly impermissible. Accordingly, in any coalitional work relating to a contested election, 501(c)(3)s should exercise great care to ensure that they are not subsidizing or promoting the partisan campaign activity of another organization. In particular, 501(c)(3)s should avoid coordinating their activities with or otherwise supporting the work of any candidate's campaign committee, political party entity, or other political committee. 501(c)(3)s may work with 501(c)(4) organizations conducting non-partisan advocacy and may distribute materials created by such organizations so long as those materials do not contain 501(c)(3)-prohibited content. However, 501(c)(3)s must avoid coordinating with or otherwise subsidizing the partisan activities of their 501(c)(4) affiliates or allies.[3]

B. Activities Constituting Lobbying

501(c)(3)s are subject to limits on the amount of lobbying activities in which they may engage, with lobbying referring to communications intended to influence specific legislation.[4]

[3] 501(c)(3)s should exercise care in this regard, keeping in mind that the 501(c)(4) organization it is working with is not operating under the same restrictions as the 501(c)(3) is and may not have any particular reason to ensure that its own communications are non-partisan.

[4] Public charities can pick between two different standards by which compliance is measured, the "no substantial part test" and the "501(h) expenditure" test, with the 501(h) expenditure test providing for greater specificity both about what counts as lobbying and how much the organization can spend on such activities. A full explication of the differences between these two tests is beyond the purpose of this memorandum, and because the 501(h) expenditure test provides for greater clarity, this memorandum will generally assume that the 501(c)(3) organization at issue is a

"Legislation" includes most actions by a legislative body at the federal, state, or local level, but does not include actions by judicial, executive, and administrative bodies.

In the context of a contested election, advocacy by a 501(c)(3) organization that is directed to executive or administrative officials (e.g. calling on a state's Governor or Secretary of State to continue the counting of ballots) or judicial officials (e.g. protesting outside of a courthouse against a potential order halting the counting of ballots) would not be lobbying so long as it is not for the purpose of influencing *legislation*. On the other hand, advocacy calling for state legislators to introduce or pass a bill to extend the deadline for counting ballots or for governors to veto/support such legislation may be lobbying if the communication is made directly to a government official or qualifies as a grassroots lobbying communication.

Note: In addition to the federal tax limitations on lobbying activities, 501(c)(3)s must also comply with the Lobbying Disclosure Act and its state-law equivalents. These disclosure regimes vary widely in terms of what types of activities and expenditures require registration and reporting. Before directing advocacy activities toward a federal, state, or local government official or employee, organizations should consult their counsel to determine whether those activities will trigger any registration or reporting obligations.

III. Application to Potential Activities

This section of the memorandum briefly addresses certain potential activities that CDP and its allies may be considering in the event of a contested election. In each case, of course, context matters, and even though one of these activities may be permissible in a vacuum it does not mean the organization is immune from criticism or allegations that these activities are part of an effort to intervene in the political campaign of a candidate for public office.

A. Public Education and Advocacy

It would likely be *permissible* for a 501(c)(3) organization to issue public statements (e.g. in media appearances, op-eds, blog posts, or social media posts)—

- advocating for all lawful voters to be able to vote safely and have their votes counted;
- opposing calls to halt the ballot count or stop accepting mail-in ballots in a given state (provided the organization is consistent in its position without regard to which candidate would be perceived to benefit); or

501(h)-elector. Organizations that operate under the "no substantial part" test should exercise additional caution around advocacy that could arguably be viewed as lobbying and should consult with their counsel.

- calling out misinformation about the legitimacy of mail-in ballots; or

- calling out actions or statements by one or both of the candidates that threaten the legitimacy of the election or the ability of voters to have their votes counted.

On the other hand, it would likely be *impermissible* for a 501(c)(3) organization to adapt its stance to what would stand to benefit a particular candidate, or to call for a candidate to be deemed the rightful winner of the election.

B. Grassroots Organizing

It would likely be *permissible* (though may also constitute lobbying under federal tax law and/or federal or state lobbying disclosure laws) for a 501(c)(3) to encourage members of the public to take certain actions, such as—

- turning out to a protest or signing a petition calling for all votes to be counted or calling on officials to uphold the integrity of the election; or

- contacting federal or state officials to encourage them to take action to ensure that all votes are counted; or

- asking state officials to certify state election results, and federal officials to accept those results, in a fair and nonpartisan manner.

On the other hand, it may be *impermissible* for a 501(c)(3) organization to encourage members of the public to advocate for a particular slate of electors to be certified, or to protest or rally in support of a particular candidate.

C. Paid Media

501(c)(3)s can make the same sort of statements discussed above as likely permissible through paid media (e.g. print ads, digital ads, radio ads, television ads) as well as free media. Federal and state campaign finance laws that apply to certain paid communications that refer to a candidate in a certain period of time before an election on which they appear on the ballot do not apply after Election Day. Accordingly, there are no special rules associated with paid messaging around a contested election.

D. Coordinated or Coalitional Activities

501(c)(3)s should exercise great care when working with other organizations or participating in a coalition concerning a contested election. It would generally be *permissible* for a 501(c)(3) organization to—

- coordinate its post-election activities with other 501(c)(3)s engaged, and share materials put out by such organizations (provided that those organizations reasonably appear to be complying with applicable legal limits on their activities); or

- coordinate its post-election activities with non-501(c)(3) organizations engaging in explicitly non-partisan activities, and share materials from such organizations that contain no 501(c)(3)-prohibited content (e.g. reflecting a desired outcome to the election, or promoting a private business).

On the other hand, it would likely be *impermissible* for a 501(c)(3) to coordinate its activities with, or participate in a coalition with, a campaign, political party committee, or other partisan political organization, or any other organization operating on a partisan basis, or to share materials from such organizations that reflect a desired outcome to the election contest.